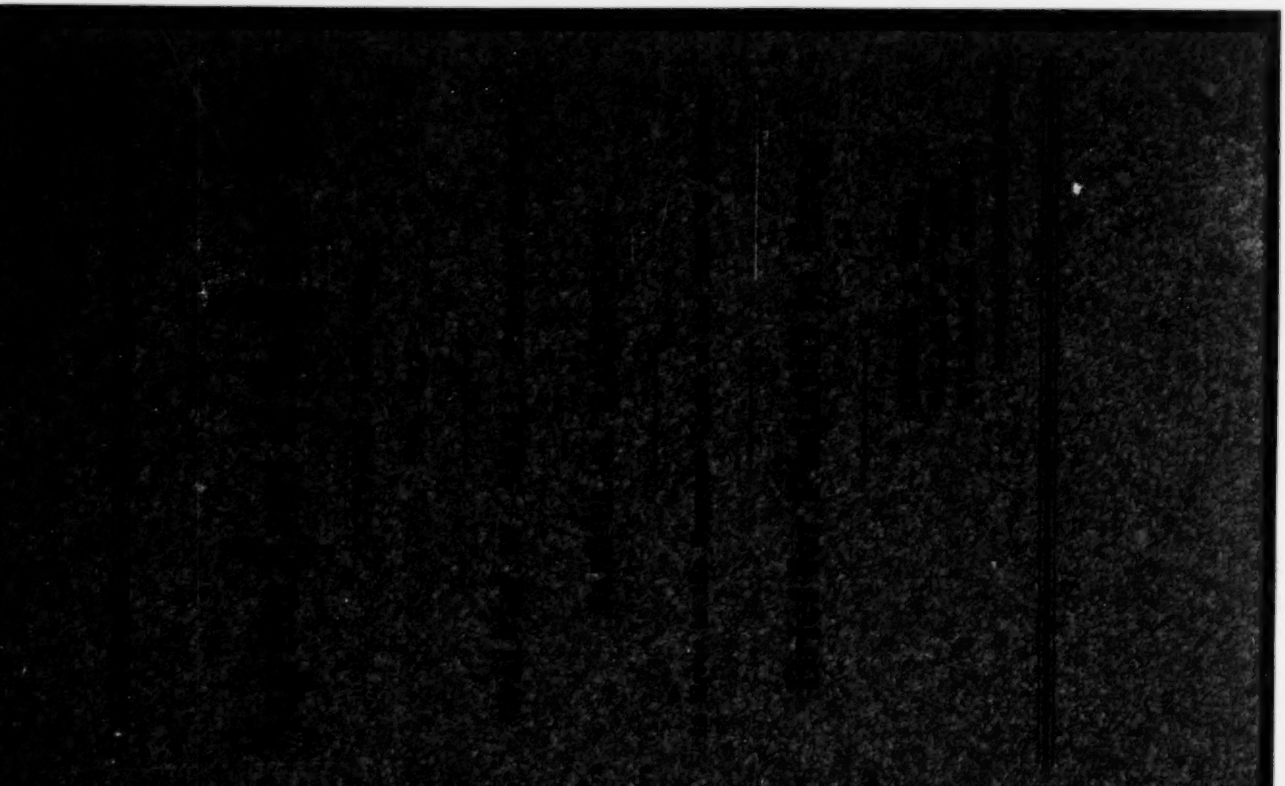

IN THE

Supreme Court of the United States.

October Term, 1904.

WALTER W. SMALL, *Plaintiff in Error*,
v.
SAMUEL O. RAKESTRAW. } No. 133.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

I. Statement of the Case.

History of the Case.

The plaintiff in error, Walter W. Small, on April 2, 1898, filed his amended complaint in the nature of a bill in equity in the District Court of the Eleventh Judicial District of Montana, in and for the County of Flathead, against Samuel O. Rakestraw, the defendant in error, praying that the plaintiff be decreed to be the equitable owner of certain land in that county for which the defendant, Samuel O. Rakestraw, had obtained a patent from the land officers of the United States.

The defendant demurred generally to the complaint (Record, pp. 7, 8). The demurrer was sustained by the District Court and the complaint dismissed.

The claimant appealed to the Supreme Court of the State (p. 9). The judgment of the District Court was affirmed by the Supreme Court of the State, an opinion being delivered (pp. 10–13).

The plaintiff, Walter W. Small, then brought the case to this court by writ of error (p. 15).

The question therefore is whether the averments of the complaint are sufficient to entitle the plaintiff to relief.

Summary of Complaint.

The averments of the complaint (pp. 1–7) may be thus summarized :

During the latter half of the year 1886, the plaintiff, having all the qualifications required by law, settled and established his residence upon the quarter section of land in controversy, being at the time a part of the unappropriated public lands of the United States (Par. I, p. 1).

These lands did not become subject to entry and filing until August 16, 1891, when the approved plat of survey was filed in the United States Land Office at Missoula, Montana, the office of the district in which the land was situated. On August 17, 1891, plaintiff applied to make and did make homestead entry of the land at that land office under Section 2289 of the Revised Statutes of the United States, making the affidavit required by law and regulations in good faith with intent to acquire title thereto under the homestead laws of the United States (Par. II, p. 2).

On January 26, 1892, he applied to make and did make final proof of his homestead entry and of his residence upon, cultivation and improvement of the land. He had from the time of his settlement in 1886 until long after submitting and offering his final proof continued to reside upon, cultivate, and improve the land in good faith, and would have continued to do so and would have received a patent therefor but for the wrongful acts of the defendant (Par. III, p. 2).

On the 26th of March, 1892, the defendant filed an affidavit of contest against the plaintiff's homestead entry,

alleging that the plaintiff had never made settlement upon the land; that for several years previously claimant had resided at or near Demersville, about sixteen miles from the land; that the defendant had made valuable improvements on the land, including a dwelling house, barn and well, long prior to the date of plaintiff's entry; that he was prevented from continuing his residence on said land and from improving the same by the plaintiff, who shot his horses down in the field while seeding, destroyed his buildings, and threatened to shoot him unless he desisted from making further improvements on the land; that his right to the land was initiated prior to the plaintiff's; that at the time of the initiation of the plaintiff's right on the land it was unsurveyed and that the plaintiff was ineligible to initiate his right for the reason that he was residing upon a pre-emption claim to which he subsequently perfected title by making final entry.

On this contest the register and receiver of the Land Office at Missoula, Montana, decided in favor of Rakestraw, the defendant, May 7, 1892, and recommended the plaintiff's homestead entry for cancellation.

From this decision said plaintiff, as such homestead claimant, duly appealed to the Commissioner of the General Land Office, at Washington, D. C. On or about the 18th day of October, 1892, said Commissioner reversed the said decision of the said register and receiver, and allowed said entry to remain intact and uncancelled, and dismissed said contest, rendering therein his decision in which he found the following facts, and no others, to wit:

"That the land was first opened to filing August 16th, 1891, and that he (said plaintiff) proved up on a pre-emption claim in June, 1886," and that said plaintiff "established residence on the land in dispute in August, 1886;

"That contestant has failed to sustain the charges al-

leged in the affidavit of contest filed March 26th, 1892, except that he may have been prevented from continuing his residence on said land by Small's actions, and threats, and that Small (plaintiff) may have shot his horses as alleged; and that the charge that Small has resided at Demersville for several years is only partly borne out, as the evidence seems to show that he has resided there only a greater part of the year 1891.

"I do not find any testimony to sustain your finding that speculation appears in Small's motives * * * It seems in this case that Small on account of ill health and poverty had been unable to cultivate and improve the land for a large part of the time since settlement, and that it was necessary for him to work elsewhere to earn the money to improve the same.

"It also seems that the land was cultivated under his direction every year after he made homestead entry except the year 1891, when he alleged he left to avoid personal difficulty with Rakestraw (defendant herein), and when it seems that W. E. Walker, who went there to break the land for him, was ordered off by contestant.

"It also seems that from the substantial nature of his improvements, which seem to be worth about $800, and the amount of personal labor he has bestowed in improving same that Small has shown a *bona fide* intention to return to make the land his home.

"It also seems that he has fifty acres reduced to state of cultivation and while his visits were, with a few exceptions, one of which was when he spent seven months on the land, of short duration and at intervals some time apart, still, I do not think your finding of bad faith and non-compliance with law as to occupancy are warranted by the evidence.

"That 'the maintenance of a residence, established in good faith, is not inconsistent with absence rendered necessary to secure, support, and improve the land,' and in case of Geo. F. Lutz (9 Land Decisions, 266) it is held that 'residence on land and actual presence thereon are not convertible or synonymous terms, and residence being once established, subsequent absences, *animo revertendi*, and for a lawful purpose not indicating an intent to abandon, do not break the continuity of such residence.'

"That 'the contestant having failed to sustain his charges, the question of cancelling the entry and forfeiting the entryman's claim becomes one between him and the Government alone.' For the reasons above stated the contest of Rakestraw is dismissed."

Plaintiff alleges that the foregoing are all the findings of fact and of law made and found by said or any Commissioner of the General Land Office in said or any contest relating to said lands (Par. IV., pp. 3, 4).

Thereupon the defendant appealed from the decision of the Commissioner to the Secretary of the Interior. He rendered his decision March 28, 1895, reversing the decision of the Commissioner. The full text of his decision is given in the record (p. 5), all but the formal portion thereof being as follows:

"January 21, 1892, plaintiff filed his affidavit of contest against the defendant's homestead entry charging that the entryman had failed to comply with the law as to residence. The testimony of Small, himself, is that he never voted in the precinct in which his homestead entry lies, but did vote at other points a long distance from his homestead at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter shop in town, and, to use his own words, 'determined to return to the ranch only often enough to keep a good showing of habitation.' His excuse for that was the plaintiff threatened him with violence if he undertook to stay on the land.

"Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land, precludes an entryman from claiming residence at the same time, on the land for homestead purposes. *George T. Burns* (4 L. D. 62); *Hart* v. *McHugh* (17 L. D. 176); *Edwards* v. *Ford and O'Connor*, decided June 18, 1894.

"Your office decision is reversed and Small's homestead is cancelled." (Par. V, pp. 4, 5.)

The facts are stated in the complaint to be, and it is stated that they were shown at the hearing to be that the plaintiff voted at Granite, in the county of Granite, State (then Territory) of Montana, at the election held in that Territory in the fall of 1889, and at the general election in the fall of 1890, he voted at the town of Bonner in Missoula County, Montana, in which last named county the land was then situated; that after voting at the town of Granite, the claimant returned to, resided upon, improved and cultivated the land during the year 1890 and prior to any pretended settlement of the defendant thereon; that in December, 1890, after voting at Bonner, plaintiff returned to the land; that these two were the only places at which plaintiff voted between the time of his settlement on the land and the fall of 1892 after he had made his final proof; that at the time plaintiff voted at Bonner under the laws of Montana a resident of the County of Missoula could vote at any precinct therein without regard to the particular precinct in which he then resided (Par. VI, pp. 5, 6).

He complains that the action of the Secretary of the Interior misapplied the law, inasmuch as the law did not then require the plaintiff to vote in the precinct of his residence (Par. VII, p. 6).

Pursuant to the decision of the Secretary of the Interior, the plaintiff's entry was cancelled and the defendant permitted to make homestead entry of the land, and thereafter on or about February 26, 1897, a patent was issued to the defendant for the land (Par. VIII, p. 6).

At the time the plaintiff made final proof for the land, January 26, 1892, he paid the purchase price therefor, and all fees and costs connected therewith, and he claims now to be the equitable owner thereof and entitled to possession thereof (Pars. IX, X, XI, pp. 6, 7).

II. Assignment of Error.

The plaintiff in error hereby assigns for error in the proceedings and judgment of the Supreme Court of the State of Montana, as well as of the District Court whose judgment was by said Supreme Court affirmed, that said courts decided against the claim specially set up by the plaintiff in error under Section 2289 of the Revised Statutes of the United States, and the other provisions of law contained in Chapter 5, "Homesteads," Title 32 "The Public Land," Revised Statutes of the United States, and held that the claim to a homestead right set up by him under said section was invalid and did not entitle him to conveyance of the legal title from the defendant in error, Samuel O. Rakestraw;

Whereas said courts should have held that by reason of his settlement and entry, he, the plaintiff in error, acquired a valid title to the land in controversy, and said courts should have decreed that he was entitled to relief by a conveyance of the legal title from the defendant in error, Samuel O. Rakestraw.

III. Brief of Argument.

General Principles Governing the Case.

The principle on which this class of cases is to be determined was very clearly stated in *Lindsey* v. *Hawes* (2 Black, 554, 557):

"Under these circumstances we have no hesitation in holding that the action of the officers of the land office was *not* conclusive upon their rights, and that a court of equity may inquire into the proceedings by which the title was vested in Hawes, and afford relief if a proper cause for it is shown to exist."

It was re-examined and more fully stated in *Johnson* v. *Towsley* (13 Wall. 72, 86, 87):

"Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the land office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when, in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief.* * *

"This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."

Again in *Cornelius* v. *Kessel* (128 U. S. 456, 461):

"The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them,

where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

To these cases may be added *Cunningham* v. *Ashley*, 14 Howard, 377; *Barnard's Heirs* v. *Ashley's Heirs*, 18 Howard, 43; *Garland & Wynn*, 20 Howard, 6; *Lytle* v. *Arkansas*, 22 Howard, 193; *O'Brien* v. *Perry*, 1 Black, 132; *Minnesota* v. *Bachelder*, 1 Wall. 109; *Stark* v. *Starrs*, 6 Wall. 402, 419; *Silver* v. *Ladd*, 7 Wall. 219; *Monroe Cattle Company* v. *Becker*, 147 U. S. 47, 57; *Thayer* v. *Spratt*, 189 U. S. 346; *Hodges* v. *Colcord*, 193 U. S. 192.

The question therefore is, Did the facts found by the officers of the land department on the testimony adduced to them, warrant their decision that Rakestraw was entitled to a patent, or should they have decided in favor of Small?

If Small was entitled to a decision upon the facts shown he is entitled to relief by a decree that Rakestraw holds it as trustee for him and should convey accordingly

Decision of General Land Office.

The decision of the Commissioner of the General Land Office is stated in the complaint (Par. IV, pp. 3, 4) to have "found the following facts and no others, to wit:" These facts we paragraph and number in their order without making any change in their language.

1. "That the land was first opened to filing August 16th, 1891, and that he (said plaintiff) proved up on a pre-emption claim in June, 1886," and that said plaintiff "established residence on the land in dispute in August, 1886;"

2. "That contestant has failed to sustain the charges alleged in the affidavit of contest filed March 26th, 1892, except that he may have been prevented from continuing his residence on said land by Small's actions, and threats, and that Small (plaintiff) may have shot his horses as alleged; and that the charge that Small has resided at Demersville for several years is only partly borne out, as the evidence seems to show that he has resided there only a greater part of the year 1891."

3. Said Commissioner further found as follows, to wit:

"I do not find any testimony to sustain your finding that speculation appears in Small's motives. * * * It seems in this case that Small on account of ill health and poverty had been unable to cultivate and improve the land for a large part of the time since settlement, and that it was necessary for him to go to work elsewhere to earn the money to improve the same.

4. "It also seems that the land was cultivated under his direction every year after he made homestead entry except the year 1891, when he alleged he left to avoid personal difficulty with Rakestraw (defendant herein), and when it seems that W. E. Walker, who went there to break the land for him, was ordered off by contestant.

5. "It also seems that from the substantial nature of his improvements, which seem to be worth about $800, and the amount of personal labor he had bestowed in improving same that Small has shown a *bona fide* intention to return to make the land his home.

6. "It also seems that he has fifty acres reduced to state of cultivation and while his visits were, with a few exceptions, one of which was when he spent seven months on the land, I do not think your finding of bad faith and non-compliance with law as to occupancy are warranted by the evidence."

The conclusions of law of the Commissioner are thus stated (Par. IV, p. 4); they being likewise numbered:

1. "That 'the maintenance of a residence, established in good faith, is not inconsistent with absence rendered necessary to secure support and improve the land,' and in case of Geo. F. Lutz (9 L. D. 266) it is held that 'Residence on land, and actual presence thereon are not convertible or synonymous terms; and, residence being once established, subsequent absences *animo revertendi* and for a lawful purpose not indicating an intent to abandon, do not break the continuity of such residence.'

2. "That 'the contestant having failed to sustain his charges, the question of cancelling the entry and forfeiting the entryman's claim becomes one between him and the Government alone.'

"For the reasons above stated the contest of Rakestraw is dismissed."

Decision of Secretary of Interior.

The decision of the Secretary of the Interior on this appeal is thus stated as to the facts:

"The testimony of Small, himself, is that he never voted in the precinct in which his homestead entry lies, but did vote at other points a long distance from his homestead at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter shop in town, and, to use his own words, determined to return to the ranch only often enough to keep a good showing of habitation.' His excuse for that was that the plaintiff threatened him with violence if he undertook to stay on the land." (Par. V, p. 5.)

The conclusion on the law was thus stated :

" Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land, precludes an entryman from claiming residence at the same time, on the land for homestead purposes. *George T. Burns* (4 L. D. 62); *Hart* v. *McHugh* (17 L. D. 176); *Edwards* v. *Ford and O'Connor*, decided *June 18, 1894.*" (Par. V, p. 5.)

Commissioner's Finding as to Residence.

It will be observed that the findings of the Commissioner of the General Land Office are the findings made by the highest officer who has passed on the question with reference to the general facts of the case, while that of the Secretary of the Interior consists of a reversal of the Commissioner's decision on a single proposition only with regard to voting. We therefore submit some definitions taken from the decisions of the Interior Department in land cases to show the character of residence required.

Statutory Requirements as to Residence.

The requirements made by law are contained in Sections 2290, 2291, and 2297 of the Revised Statutes.

Section 2290 requires the person applying for the benefit of the homestead law to make affidavit, among other things, " that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person."

Section 2291 requires that the settler shall be entitled to a patent at the expiration of five years upon proof by two credible witnesses " that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit."

Section 2297 provides as follows:

"If, at any time after the filing of the affidavit, as required in section 2290, and before the expiration of the five years mentioned in section 2291, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

Departmental Decisions on Residence.

To show the construction placed in practice on these provisions of law as to residence we quote a number of decisions of the department as reported in the official series of Land Decisions, numbering the paragraphs consecutively for convenience of reference.

1. Poverty excuses non-continuous residence. Drought excuses non-cultivation, provided good faith is manifested by the homestead claimant. (*Clark* v. *Lawson*, 2 Land Decisions, 149.)

2. Where the entryman's absences were caused by sickness and poverty, and in no instance exceeded four months, and where there was good faith shown in the matter of cultivation and improvement, the entry was allowed to stand. It appears in this case that the longest absence was about four months. Owing to lack of means he had to work away from his claim during the winter months to obtain money for the proper improvement of the land. Improvements amounted to $1,200. (*Foley* v. *Brasch*, 2 Land Decisions, 155.)

3. Entryman placed improvements worth $350 on land. He was a newspaper correspondent and frequently absent, taking his wife with him, but had no fixed abode save on the land. The value of improvements and the fact that the settler made no attempt to conceal the facts held sufficient. (*Dunlap*, 3 Land Decisions, 545.)

4. In the matter of pre-emption entry, the value of the improvements, preparations for a permanent home, and residence after final proof are held as evidence of good faith, and therefore excuse temporary absences from the land. (*Kurtz* v. *Holt*, 4. Land Decisions, 56.)

5. Pre-emption entry. Though continuous residence is required of the pre-emptor, temporary absences, which do not impeach good faith, are excused. (*Andrew J. Healey*, 4 Land Decisions, 80.)

6. Homestead entry. The maintenance of a residence established in good faith is not inconsistent with absences rendered necessary to secure support, and improve the land. She had a small house built on the land, but taught school at the county seat, returning generally once a week. (*Nellie O. Prescott*, 6 Land Decisions, 245.)

7. The establishment of residence within six months from date of homestead entry is not a specific statutory requirement, but a regulation of the Department, based on the provision in section 2297 of Revised Statutes, authorizing cancellation on proof of abandonment or change of residence for more than six months. The poverty of the claimant, the condition of his family, and the severity of the climate, are matters entitled to consideration in determining whether due compliance with the law as to residence has been shown. (*Nilson* v. *St. Paul M. & M. Ry. Co.*, 6 Land Decisions, 567.)

8. Pre-emption entry. The rule requiring actual residence of the claimant on the land for six months preceding entry is for the purpose of testing the good faith of the claimant; but where the good faith of the settler is otherwise sufficiently established, temporary absences during any period of the settlement for the purpose of earning a living, not inconsistent with an honest intention to comply with the law, are accounted a constructive residence. The claimant was absent from home from

May 1, 1885, to October, 1885. (*Israel Martel*, 6 Land Decisions, 566.)

9. Temporary absences from the land that indicate no intention of abandonment may be excused after the establishment of a *bona fide* residence. (*Platt* v. *Graham*, 7 Land Decisions, 249.)

10. Similar decision in *Francis M. Wood*, 7 Land Decisions, 345.

11. Absences during the winter season, for the purpose of earning money to improve the land, are not inconsistent with the maintenance of residence in good faith. Entryman was absent from December 1, 1881, to April, 1882. He went away December, 1882, and remained until April, 1883; left in December, 1883, and returned in April, 1884; left in November, 1884, and returned in April, 1885. His absences were caused by his poverty and while absent he worked at various places as a carpenter. (*Farringer*, 7 Land Decisions, 360.)

12. Absences will not be excused where good faith is not shown. (*Ulrich Fuchser*, 7 Land Decisions, 467.)

13. After the establishment of residence, temporary absences, for the purpose of earning a livelihood, do not authorize a presumption of abandonment. (*John W. Alderson*, 8 Land Decisions, 517.)

14. After the establishment of residence, absences occasioned by sickness are excusable, and do not interrupt the continuity of the residence. The fact that the claimant while necessarily absent from the land, on account of sickness, voted in the precinct where he had been taken for treatment, will not in itself raise a conclusive presumption of abandonment, where he subsequently returned to the land. He was in the hospital about two months at that time and several times afterwards a month at a time. Improvements were about $100. (*James Edwards*, 8 Land Decisions, 353.)

15. Pre-emption claim. Residence on land, and actual presence thereon are not convertible or synonymous terms; and, residence being once established, subsequent absences *animo revertendi* and for a lawful purpose not indicating an intent to abandon, do not break the continuity of such residence. (*George F. Lutz*, 9 Land Decisions, 266.)

16. Homestead. Where the good faith of the settler is otherwise sufficiently established, temporary absences during any period of the inhabitancy, for the purpose of earning a living, not inconsistent with an honest intention to comply with the law, may be accounted constructive residence. (*Montgomery* v. *Curl*, 9 Land Decisions, 57.)

17. Homestead entry. Temporary absences caused by ill health do not interrupt the continuity of residence. The cultivation of crops from year to year indicates the good faith of the settler. Entryman made crops in 1883, 1884, and 1885. (*Alfred M. Smith*, 9 Land Decisions, 146.)

18. Continuity of residence is not broken by temporary absences made necessary by the poverty of the claimant. (*Mary J. Main*, 12 Land Decisions, 102.)

19. Similar decisions in cases of *Richard L. Williams* (13 Land Decisions, 42), and *Logan* v. *Gunn* (13 Land Decisions, 113.)

20. Entryman was a carpenter and worked at his trade in Seattle to obtain means of support for himself and family in Boston, Mass. He spent all of his leisure time on his claim, averaging about two days in a week. He had improvements valued at $560. It was held that the good faith of the entryman was not impeached by absence from land to earn money to support himself and family and to enable him to pay for the land. (*Paulsen* v. *Ellingwood*, 17 Land Decisions, 1.)

21. Engagement in public service will not be construed into an abandonment of residence, so long as such efforts

are made to maintain improvements as manifest good faith on the part of the entryman. The entryman in this case took the position of letter carrier at West Superior in November, 1890, and held it up to the time of filing a contest June 27, 1893. He visited the place and occupied the house for some days at a time about four times a year, continuing to have some clearing done and planting a small patch of potatoes each year. Improvements estimated at $350. (*Tomlinson* v. *Soderlund*, 21 Land Decisions, 155.)

Application of These Decisions.

These decisions fully sustain the finding of the Commissioner of the General Land Office that the absence of Small from the land for the purpose of earning a living, as well as that on account of ill health and poverty he had been unable to improve the land for a large part of the time, were fully consistent with good faith and continued cultivation and residence.

It will be seen that two of these decisions cover the specific case of a carpenter working at his trade. In one instance, No. 11, *ante*, page 15, he was away three successive years from December to April, and the fourth year from November to April. In the other case, No. 20, *ante*, page 16, he worked at his trade in the City of Seattle, his family being at Boston, Massachusetts, and spent an average of about two days a week on his claim. In each instance it was held that his good faith and the continuity of his residence were not impeached by this absence from the land while working at his trade.

The plaintiff in error in this case was a carpenter by trade and worked at his trade at the town of Demersville about sixteen miles from the land, surely not a sufficient distance as distances go in the West to warrant any presumption of abandonment of the claim.

The case No. 21, *ante*, pp. 16, 17, of the letter carrier at West Superior, Wisconsin, is perhaps still stronger, as he seems to have visited the land only some days at a time about four times a year, but the fact that he put improvements of the value of about $350 on the land, was continually having some clearing done, and planted a small patch of potatoes each year, was held sufficient to establish continuity of residence and cultivation.

Decisions of this Court on Residence.

The case of *Bohall* v. *Dilla* (114 U. S. 47) quoted by the court below in support of its conclusion (Record, p. 13) presented an entirely different case. It was there said (p. 51):

"It is plain that the defendant, Bohall, did not bring himself within the provisions of the pre-emption laws. Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon. This implies a residence both continuous and personal. No such continuous residence was shown on the part of Bohall. He was placed in possession of the premises under the judgment of the State court in May, 1868; and it was necessary to prove that he occupied them continuously after filing his declaratory statement. It was shown, however, that he resided elsewhere from July, 1869, to December, 1871, and from April, 1872, to August, 1874. Though he claimed the land for six years he and his family resided elsewhere during four of them, and no sufficient excuse for such residence was offered. It is only under special circumstances that residence away from the land is permissible. The settler may be excused for temporary absences caused by well founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by engagement in the military or naval service. Except in such and like cases the requirement of a continuous residence on the part of the settler is imperative."

So, again, in *Lee* v. *Johnson* (116 U. S. 48), also quoted in opinion of the court below (Record, p. 12), the issue of abandonment as well as that of good faith was clearly raised before the Interior Department and the decision of those officers of the question of fact thus raised was adverse to the party seeking relief.

The plaintiff in error it seems hired a man, one W. E. Walker, to break the land for him (Record, near top of page 4) and this he had the right to do.

In *Silver* v. *Ladd* (7 Wall. 219, 225) the court says:

"Nor is any importance to be attached to the fact that Mrs. Thomas was old and incapable of the manual labor necessary to cultivating ground. If it was done for her by hired servants, or by her son without compensation, it is equally available to her."

In this case the decision of the highest officer who has passed upon the general question of residence is that the plaintiff has sufficiently established residence and cultivation in good faith and has shown no intention of abandoning the land.

Voting in Another Precinct No Bar.

The decision of the Secretary of the Interior disclaims the intention to pass upon any question of the case than that of the residence of the plaintiff in error for voting purposes. The decision is upon this sole ground. "Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land, precludes an entryman from claiming residence at the same time, on the land for homestead purposes." (Record, p. 5).

Is this decision correct in point of law?

Clearly the Secretary had not before him the provisions of the laws of Montana referred to at the conclusion of Paragraph VI of the complaint (Record, p. 6):

Montana Election Statutes.

"Sec. 1007. All male citizens of the United States above the age of twenty-one years, and all male persons of the same age who shall have declared their intention of becoming citizens, and who, under existing laws of the United States, may ultimately become citizens thereof, shall be deemed electors of this territory, and be entitled to vote for delegate to congress, and for territorial, district, county, precinct and municipal officers, provided they shall have resided in the territory six months, and in the county where they may offer to vote, thirty days next preceding the day of election." (Compiled Statutes of Montana, 1887, p. 923.)

"Sec. 1020. It shall be lawful for any elector to vote for delegate to congress at any place of holding elections in this territory, for members of the legislative assembly, and all other officers, at any place for holding elections within the particular limits for which such member of the legislative assembly and such other officers are to be elected: *Provided*, That an elector, qualified to vote for part and not all of the officers to be chosen at any election, shall vote an open ticket, and the judges may determine the legality of such vote." *Id.* p. 926.

The only vote which can really give rise to any serious question in this case was the one cast at the election of 1889. This was a general election held pursuant to the act of Congress approved February 22, 1889 (25 Stat. L. 676, Sec. 8, p. 678), for the purpose of voting upon the proposed constitution for the State. Section 9 (*Id.* p. 679) of this same act authorizes the election of representatives to Congress at the same time. Pursuant to this act of Congress, the Constitutional Convention passed an ordinance containing the following provisions.

First. "That an election shall be held throughout the Territory of Montana on the first Tuesday of October, 1889, for the ratification or rejection of the Constitution framed and adopted by this Convention.

Third. "Said elections shall be held at the several polling

places and precincts throughout the Territory appointed for the holding of elections under the laws of the Territory, and shall be conducted in a manner prescribed by the laws of the Territory regulating elections. The Boards of County Commissioners of the several counties of the Territory shall appoint judges and clerks of such election in each of said polling places and precincts in the same manner as is now required by law for the appointment of judges and clerks of general elections in the Territory, p. 67.

Seventh. "There shall be elected at the same time one representative in the 51st Congress of the United States." (Laws of Montana, 1891, pages 67 and 68.)

Section 1020 above quoted seems to have in contemplation that a general question affecting every one in the Territory or State may be voted on anywhere within the Territory or State and that a question affecting a particular district shall be voted on by the residents of such district. Hence even if there was nothing to be voted on but the question of the adoption of the Constitution, it would seem that Small might lawfully have voted at any point in Montana, but when it appears that at the same election, a representative in Congress was voted for, all question as to the right of Small to cast a vote without regard to his residence is eliminated. It may be said that Section 1020 relates only to a vote for a delegate to Congress. That was a territorial law, as a delegate is a territorial officer, but the ordinance of the Constitutional Convention expressly provided that the Territorial law should govern this election for a representative in the fifty-first Congress.

Departmental Decisions on Voting.

The following decisions seem to cover this point conclusively. In *California* v. *Sevoy* it was said:

"I find nothing in the record tending to impeach the testimony as to his residence upon his claim except the

admission made by Sevoy, that in the fall of 1884 he voted in Crescent City, a different precinct from that in which the claim is located. While this is a circumstance that may be considered in determining the residence of the claimant at that time, it does not necessarily impeach the testimony that his only home was upon the tract in controversy, and considering all the evidence together I am inclined to believe that his voting in Crescent City, indicated an illegal act rather than a change of domicile. It was during the time his wife was sick in Crescent City, where he went on account of his wife's health, leaving two members of his family on the claim to which he returned as soon as his wife's health would permit, indicating that it was not his intention to change his domicile when he left the claim in August, 1884." (9 Land Decisions, 139, 142.)

The distinction between this and the case of bad faith was very clearly drawn in another case. In the case of *Pratsch* v. *Dobbins*, it is said that the testimony establishes to the satisfaction of the Commissioner of the General Land Office that Pratsch was not a *bona fide* resident of the land; that even if he had made actual settlement thereon he had since abandoned it; that the registration and poll books of Aberdeen precinct in Chihalis County, Washington, for 1891, 1892, 1893, and 1894, show that he was a legal voter and actual resident of the second ward of said city and that his claim was based upon a mere pretence of settlement. The Secretary after referring to the case of *California* v. *Sevoy* (9 Land Decisions, 139) says:

"But where registering and voting have been done for several successive years, and an oath has been taken each year, by a party, that he was an actual resident of the place at which the registering and voting occurred, the case is entirely different, and, in my opinion, the presumption either of non-residence on the land or abandonment of such residence, is conclusive." (*Pratsch* v. *Dobbins*, 24 Land Decisions, 426.)

See the department decision above cited as No. 14, *ante*, p. 15, in which the homesteader, absent on account of sickness, voted in the precinct where he had been taken for treatment and was held not to have by this act abandoned or forfeited his claim.

APPLICATION OF THESE DECISIONS.

It is submitted that the casting of a single vote at a general election ordered by act of Congress directing an election on the question of the adoption of constitution for the State (Act of February 22, 1889, 25 Stat. L. 676, § 8, p. 678), which election was afterwards actually held (Proclamation No. 7, November 8, 1889, 26 Stat. L. 1551), is to be construed in connection with the findings of the Commissioner of the General Land Office as to *bona-fide* residence on the land in the nature of an irregular act of the plaintiff in error in voting in the wrong county rather than in the nature of an abandonment of a *bona-fide* residence. Certainly a single act of this kind should have no conclusive effect against the plaintiff who has established *bona-fide* residence and cultivation, in view of the Montana law.

It is also to be considered that this election of 1889, which is the only one which can give rise to any serious question in this case, was, according to the averment of the complaint which must on this demurrer be taken to be true (Record, Par. VI, near foot of page 5), prior to any pretended settlement of the defendant in error, Rakestraw, on the land. The precise averment is, "that after voting at said town of Granite said plaintiff returned to, resided upon, improved and cultivated said land during the year A. D. 1890, and prior to any pretended settlement of said defendant thereon." (Par. VI, Record, near foot of page 5.)

It is very questionable therefore if the defendant in

error occupies any position to enable him to take advantage of Small's act in voting in another county.

The entry of Rakestraw seems to have been of very much the character of that condemned by this court in *Atherton* v. *Fowler* (96 U. S. 513), a case which has been repeatedly followed and applied. (*Hosmer* v. *Wallace*, 97 U. S. 575; *Quinby* v. *Conlan*, 104 U. S. 420; *Del Monte Mining Company* v. *Last Chance Mining Company*, 171 U. S. 55, 82.)

Conclusion.

It is therefore submitted that the plaintiff in error being shown by the facts submitted to the officers of the Land Department of the Government, as disclosed by their own decision, has the better right to the land in controversy and that the State Court erred in refusing so to adjudge.

It is submitted that the judgment of the Supreme Court of Montana should be reversed and the cause remanded to that court for further proceedings.

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